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No. 93-1561

In The

Supreme Court of the United States

October Term, 1993

BISHOP COLLINS, et al.,

Petitioners,

vs.

GERALD THOMPSON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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Respondents, in their brief in opposition, attempt to divert the Court's attention from the important question presented by this petition: What are the appropriate standards for a court to apply when considering a motion to dissolve a consent decree? Instead, respondents claim that the courts below only interpreted the consent decree and then, after dissolving it, terminated continuing jurisdiction in this case. Brief in Opposition at 11-12. That, however, is not what happened below.

When respondents accuse petitioners of misrepresenting the Ninth Circuit opinion, Brief in Opposition at 6, they are asking this Court to read the most recent panel opinion narrowly and literally and to ignore the other related orders that panel issued in this case. All the panel's orders, though, must be considered together to understand what the Ninth Circuit actually did. One cannot isolate the panel's final opinion from its other orders, as respondents do, without misinterpreting both the actions and the reasoning of the panel.

The Ninth Circuit never carefully examined the operative consent decree language. Therefore, respondents are mistaken when they assert that this is a case that involves only construction of a decree. And, since the courts below concluded that the decree must be vacated, contrary to the express language in the decree, the Ninth Circuit, as we have shown, must have acted under Fed. R. Civ. P. 60(b), even though the Circuit never referred to the rules governing vacating decrees or injunctions. Finally, since the Ninth Circuit panel consistently focussed on the question of constitutional conditions at the prison in each of their several orders, one must conclude that, indeed, this particular panel approved the dissolution of the decree

solely because of the purported absence of constitutional violations at the prison.

The latest Ninth Circuit opinion is internally inconsistent, further adding to the confusion in this case. The panel said it "instructed the district court to interpret the terms of the consent decree and enter a final judgment." Petition App. at A-6. Yet in the same paragraph, the panel referred to its earlier "clear order that jurisdiction end." *Id.* at A-7. The Ninth Circuit and the respondents cannot have it both ways: The lower courts could either interpret the decree, which, as discussed below, requires a final judgment incorporating the terms of the decree, including the population cap, or they could end jurisdiction under Rule 60(b) regardless of the decree's requirements. Since the Ninth Circuit ultimately approved the vacating of the decree, "because there are no ongoing constitutional violations at the reformatory," *id.* at A-2, the conclusion petitioners drew was logical, not misleading. To argue that this case merely involves interpretation of a consent decree truly misrepresents the Ninth Circuit's series of orders in this case.

I. The Court Below Terminated The Consent Decree Solely Because The Petitioners Did Not Prove Ongoing Constitutional Violations At The Prison.

Respondents claim that the lower courts engaged in a distinct, two part inquiry, first interpreting the consent decree and only secondarily considering the constitutional question. Brief in Opposition at 11-12. That claim is false. The Ninth Circuit consistently interwove the decree interpretation question with its concerns about constitutional violations in order after order. *See e.g.*, Petition App. F-2, G-2-3, D-8.

The two orders of limited remand (*id.* at F-1 - G-4) and the district court's ultimate response to those orders clearly show how far away from accepted principles of consent decree construction the courts below departed. The Court of Appeals instructed the district court to determine the language of the final judgment required by the decree "specifically considering the case of *Toussaint v. McCarthy*, [926 F.2d 800] (9th Cir. 1991). [*cert. denied*, 112 S.Ct. 213 (1991)]." Petition App. at F-2, G-3. *Toussaint*, though, did not involve interpretation of a decree. In essence, the *Toussaint* court held that relief should not be imposed in a case where there were no constitutional violations.

The district court here construed the panel's directives to require vacating the decree since, "as in *Toussaint*, there are no present violations of constitutional rights." Petition App. at B-5. The courts below thus linked even *interpretation* of the decree with a finding of constitutional violations. There is no precedent for such linkage. The language of the final judgment here must be determined by interpreting the language of the parties' agreement, *United States v. Armour & Co.*, 402 U.S. 673, 681-2 (1971), not through consideration of constitutional compliance at the prison.

The district court, in response to the Ninth Circuit orders, did not rigorously analyze the consent decree language. Nor did it utilize, in any manner whatsoever, accepted principles of consent decree construction. The district court instead interpreted the Ninth Circuit orders to convey a "clear message" to "terminate its involvement in this matter." Petition App. at B-8. Such a "message" was not based on interpretation of the decree; it depended entirely on the panel's hostility toward both

the decree as written and the district court's involvement in the case that, in the panel's view, went beyond mere preservation of constitutional rights. *Id.* at B-6.

The Ninth Circuit panel affirmed, without analysis, the district court's interpretation. The panel, however, could not have independently interpreted the decree since it too paid almost no attention to the language the parties chose when settling the case, contrary to *Armour*. While the Ninth Circuit listed three cases concerning consent decree interpretation, it did not apply any principles from those cases to analyze the actual language of the decree.

In short, the lower courts ignored the language of the consent decree to reach a result the parties never intended. This result was not based on any sort of interpretation of the decree. It occurred because the prisoners did not show any ongoing constitutional violations at the prison. This was the major error that, if left unrectified, will distort the law of consent decrees.

II. The Parties Intended To Permanently Cap The Population Of The Prison.

Respondents state, "If the parties had agreed to a permanent population cap, they would have provided for one." Brief in Opposition at 19. That is exactly what the parties intended to do when they chose the language requiring entry of a final judgment "*incorporating the terms*" of the decree, including the population reduction, upon completion of the requirements of the decree. Petition App. at K-3 (emphasis added). As the petitioners' lawyer who negotiated the decree explained, "it was plaintiffs' intent to secure an order which would permanently bar double-celling at the WSR." CR 771, Exhibit B.

While the language in Article II certainly might have been more carefully crafted, it cannot be read to require the dissolution of the decree upon "full consummation" as respondents now argue.[1]

The interpretation adopted by the lower courts and urged by the respondents bears little relationship to the actual language in the decree. Neither does it reflect the parties' understanding when they settled the case. Respondents' claim that the decree "required only a temporary reduction of the inmate population", Brief in Opposition at 15, is absurd. That interpretation would mean that the prisoners agreed to settle this case, which challenged nearly all aspects of prison life, for nothing more than a gradual population reduction that was to occur over a two year period.[2] Under respondents' interpretation, the state would be free to place thousands of prisoners in the 656 cells at WSR the day after it had completed the population reduction.

Petitioners and their counsel never would have been so foolish as to agree to a "temporary" settlement. Indeed, the district court could not have permitted such a settlement to enter, given its responsibilities to absent class members under Fed. R. Civ. P. 23(e). *See Grunin v.*

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[1] As shown in the petition at 41 n.11, respondents' argument about the meaning of Article II was not made until years after the decree was fully consummated. In 1989, when they brought their first motion to vacate the decree, respondents filed not under Article II but under Article IV, the *modification* section of the decree, asking that the decree be modified to "provide for its termination." CR 672 at 2.

[2] The decree provisions that were not related to the population reduction required only studies, not substantive changes at the prison.

International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). It is significant that the Magistrate Judge, who recommended entry of the original decree in 1981 and who heard the parties' contemporary representations as to the meaning of the decree, rejected respondents' interpretation and recommended in 1992 a permanent injunction capping the population at 656. Petition App. at C-11.

Although their argument is not clear, respondents seem to claim that the language in Article II of the consent decree referring to "the close of jurisdiction" requires vacating the decree once it has been fully consummated. Brief in Opposition at 18-19. This argument, however, can be sustained only if the Court disregards, as did the lower courts, the remaining language in Article II requiring entry of a final judgment incorporating the terms of the decree when jurisdiction closes.

More importantly, respondents' argument runs contrary to the holding in *Board of Education v. Dowell*, 498 U.S. 237 (1991), where this Court specifically acknowledged that the termination or close of jurisdiction in an injunctive case does not dissolve the decree. The *Dowell* Court considered a 1977 district court order that stated, in part, "Jurisdiction in this case is terminated . . . " *Id.* at 242. This Court held that "the 1977 order did not dissolve the desegregation decree . . . " *Id.* at 244. Thus, there is obviously a difference between the "close of jurisdiction" and the dissolution of the decree. The language used by the parties in the decree now before the Court, as with the *Dowell* order, does not require the court to dismiss the case once the decree's obligations have been met. To the

contrary, a final judgment incorporating those obligations is required.[3]

III. Respondents Have Not Met Any Of The Established Tests For Vacating A Consent Decree.

Since the courts below did not interpret the decree as it was written, those courts could properly have vacated or dissolved the decree only under Fed. R. Civ. P. 60(b). Yet there was no mention below of Rule 60(b) or the 60(b) standards defined by this Court in *Rufo v. Inmates of Suffolk County Jail*, ___ U.S. ___, 112 S.Ct. 748 (1992), or even the less demanding standards for vacating a litigated school desegregation injunction outlined in *Board of Education v. Dowell*. Rather, the courts below decided that the current absence of proven constitutional violations at WSR was sufficient to dissolve the decree.

Respondents several times repeat the distortion of petitioners' argument as mischaracterized by the Ninth Circuit.[4] Never have petitioners argued that the courts should exercise continuing jurisdiction "beyond that

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[3] Besides *Dowell*, other courts have agreed that courts can terminate jurisdiction over consent decrees without dissolving or vacating the decree. *Consumer Advisory Board v. Glover*, 989 F.2d 65 (1st Cir. 1993); *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991); *See generally* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. Miami L.Rev. 401 (1987); *See also Brewster v. Dukakis*, 3 F.3d 488, 490-91 (1st Cir. 1993).

[4] The two questions presented to the Ninth Circuit for review by petitioners in the most recent appeal were not as the Ninth Circuit and respondents claim. Petitioners asked:

> 1. When construing a consent decree that expressly requires entry of a final judgment incorporating the terms of the decree upon full consummation of the

required by the decree." Brief in Opposition at 15. Petitioners instead argued in their reply brief in the Ninth Circuit that inactive jurisdiction should be continued in this matter, as the parties agreed, since respondents could not meet even the least demanding test for dissolution of a decree, a test later described by the First Circuit in *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286 (1st Cir. 1993). Respondents do not meet this test because they cannot show that "it is unlikely that the original violations will soon be resumed if the decree were discontinued." *Suffolk County Jail*, 12 F.3d at 293. Precisely because respondents are likely to "return to [their] former ways," *Dowell*, 498 U.S. at 247, they have not met this minimal test for dissolving the consent decree. A conflict in the circuits thus does exist, warranting review by this Court.

IV. The Respondents Have Consistently Urged, And the Ninth Circuit Implicitly Agreed, That Consent Decrees That Require More Than Does The Constitution Are Not Enforceable.

Respondents attempt to minimize the conflict among the circuits and the unique holding in this case. They now

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requirements of the decree, did the district court err by entering a final judgment that vacated the decree?
2. When the parties entered the consent decree that settled this case, did they intend to cap the population at the Washington State Reformatory?

Ninth Circuit No. 93-35245, Brief of Appellants at 1. Nothing was said about continuing jurisdiction after the decree was vacated. When the Court of Appeals vacated the decree based on the absence of constitutional violations, the petitioners argued, in their petition for rehearing, that such a basis was improper.

claim that both respondents and the Ninth Circuit panel agree that consent decrees can require more than the Constitution mandates. Brief in Opposition at 10 n.8, 16. It is difficult to understand how respondents' current acceptance of this well-established rule is consistent with their arguments in earlier phases of this case where they claimed: "[T]he Defendants seek relief from the Decree on the ground that the district court lacks subject matter jurisdiction under the Eleventh Amendment to enforce remedies which exceed those necessary to cure an alleged Eighth Amendment violation." Brief of Appellants in Ninth Circuit No. 91-35056 at 10. Lest there be any doubt, respondents continued: "Regardless of the construction of the decree, the district court should not be permitted to enforce a continuing injunction mandating single-celling at WSR absent an Eighth Amendment violation caused by population levels." *Id.* at 23-24. Even in their most recent brief in the Ninth Circuit, respondents continued to argue, contrary to their concession in this Court, that "[t]he Eleventh Amendment barred the district court from continuing to enforce a consent decree in the absence of a constitutional violation." Brief of Appellees in Ninth Circuit No. 93-35345 at 18. Respondents clearly do *not* agree that this consent decree, which may in fact require more than does the Constitution, is valid.

Similarly, though less blatantly, the Ninth Circuit panel also appeared to disagree with the *Rufo* holding (and the uniform results in all other circuits that have examined the question) approving consent decrees that require more than does the Constitution. The panel's error, once again, is apparent when one examines all the orders the panel has issued. In its first order of limited remand, for example, the panel specifically required a

constitutional evaluation, Petition App. F-2, even though the appeal concerned only interpretation of and a motion to vacate a consent decree. Further, as discussed above, in that order and in the amended order of limited remand, Petition App. G, the panel ordered the district court to interpret the decree in light of *Toussaint v. McCarthy*, a case that linked federal court authority with a finding of a constitutional violation. In its memorandum of remand, Petition App. at D-8, the panel suggested that, despite this consent decree, "judicial intervention" was appropriate only "to preserve constitutional rights."

Respondents now disingenuously try to convince this Court that this case does not present the question whether constitutional compliance, without more, is sufficient to justify dissolution of a consent decree. This Court should not be misled by the confused and confusing opinion of the Ninth Circuit or the erroneous claims of respondents. Because the Ninth Circuit so far strayed from accepted practices when it vacated the consent decree, the writ of certiorari should be granted.

Respectfully submitted,

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